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BY HAND

June 4, 2010

Hon. Viktor V. Pohorelsky
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

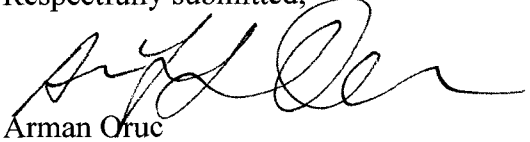
Re: Precision Associates, Inc., et al. v. Panalpina World Transport (Holding) Ltd., et al.; No. 08-cv-0042 (JG)(VVP)

Dear Judge Pohorelsky:

We represent Kintetsu World Express, Inc. Enclosed please find copies of the following filings related to the defendants' motions to dismiss:

Date Filed	ECF No.	Description
04/01/2010	386	Late-Served Defendants' Notice of Motion to Dismiss the Amended Complaint for Failure to Meet the Requirements of the FTAIA
04/01/2010	386-1	Japanese Defendants' Memorandum of Law in Support of Late-Served Defendants' Motion and Defendants' Joint Motion to Dismiss the Amended Complaint for Failure to Meet the Requirements of the FTAIA

Respectfully submitted,



Arman Oruc

Enclosures

cc: All counsel of record (via Email without Enclosures)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PRECISION ASSOCIATES, INC., *et al.*, Plaintiffs, -against- PANALPINA WORLD TRANSPORT (HOLDING) LTD., *et al.*, Defendants.	Case No. CV 08 0042-JG-VVP **NOTICE OF MOTION** **Oral Argument Requested**

LATE-SERVED DEFENDANTS' NOTICE OF MOTION TO DISMISS THE AMENDED COMPLAINT FOR FAILURE TO MEET THE REQUIREMENTS OF THE FTAIA

PLEASE TAKE NOTICE that, Defendants ABX Logistics Worldwide NV/SA (incorrectly sued as ABX Logistics Group), Airborne Express, Inc. (now known as DHL Japan, Inc.), Dachser GmbH (incorrectly sued herein as Dachser Intelligent Logistics), DHL Global Forwarding Japan K.K., DSV A/S, DSV Solutions Holding A/S, Hanshin Air Cargo Co., Ltd., Hankyu Hanshin Express Holdings Corporation, K Line Logistics, Ltd., Kintetsu World Express, Inc., MOL Logistics (Japan) Co., Ltd., Nippon Express Co., Ltd., Nishi-Nippon Railroad Co., Ltd., Nissin Corporation, SDV International Logistics, United Aircargo Consolidators, Inc., Vantec World Transport Co., Ltd., Yamato Global Logistics Japan Co., Ltd., and Yusen Air & Sea Service Co., Ltd. (the "Late-Served Defendants"), on a day and time to be set by the Court, shall move before the Honorable John Gleeson, United States District Judge for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, NY, Courtroom 6C, for an order dismissing the Amended Complaint as against the Late-Served Defendants, with prejudice, for failure to meet the requirements of the Foreign Trade Antitrust Improvements Act ("FTAIA"). The Late-Served Defendants request that oral argument be held on a date and at a time to be designated by the Court.

The Late-Served Defendants hereby join in the earlier-served Defendants' Joint Motion to Dismiss the Amended Complaint for Failure to Meet the Requirements of the Foreign Trade Antitrust Improvements Act (including Defendants' Joint Memorandum of Law in Support thereof filed on November 16, 2009, Dkt. 235, 235-1, and Defendants' Joint Memorandum of Law in Reply to Plaintiffs' Opposition to Defendants' Joint Motion filed on March 5, 2010, Dkt. 373).

The arguments and analysis included in Defendants' November 16, 2009 and March 5, 2010 filings are equally applicable to Plaintiffs' allegations against the Late-Served Defendants. The alleged conduct of these entities, like the alleged conduct of the other defendants, involves activity that occurred outside of the United States that allegedly affected freight forwarding services (such as the arrangement, organization and planning of freight shipments before the shipments were provided to air carriers) outside the United States. Specifically, the Late-Served Defendants are alleged to have agreed and imposed charges, surcharges or fees to be applied to rates charged for certain freight forwarding services. Each of the alleged charges relates to local activity outside of the United States and does not involve U.S. commerce for purposes of the FTAIA.

For this reason and the reasons explained in Defendants' November 16, 2009 and March 5, 2010 filings, Plaintiffs' allegations are, as a matter of law, insufficient to demonstrate that Defendants' alleged conduct outside the U.S. had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce that gave rise to their antitrust claims. *See* 15 U.S.C. § 6a (1)(A). Nor do Plaintiffs sufficiently allege that such conduct qualified as import commerce that would fall within the scope of the FTAIA. *See id.*

Plaintiffs' allegations regarding the Late-Served Defendants thus do not qualify as involving foreign conduct for which redress may be sought under the Sherman Act. For the foregoing reasons, the Late-Served Defendants join in Defendants' above-referenced filings and request that Plaintiffs' claims against them be dismissed for failure to meet the requirements of the FTAIA.

Additionally, none of the earlier-served Defendants are named in Claims 2, 4, 10 or 12 of the Amended Complaint while some of the Late-Served Defendants are. Those of the Late-Served Defendants who are named in those Claims also join in an additional memorandum of law being filed simultaneously herewith.

Dated: April 1, 2010

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PRECISION ASSOCIATES, INC., *et al.*

Plaintiffs,

v.

PANALPINA WORLD TRANSPORT (HOLDING) LTD., *et al.*,

Defendants.

Case No. 08-CV-00042 (JG) (VVP)

JAPANESE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF LATE-SERVED DEFENDANTS' MOTION AND DEFENDANTS' JOINT MOTION TO DISMISS THE AMENDED COMPLAINT FOR FAILURE TO MEET THE REQUIREMENTS OF THE FTAIA[1]

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(Additional counsel listed on signature page)

[1] This memorandum is filed on behalf of the following Japanese Defendants: Airborne Express, Inc. (now known as DHL Japan, Inc.), DHL Global Forwarding Japan K.K., Hankyu Hanshin Express Holdings Corporation, Hanshin Air Cargo Co., Ltd., "K" Line Logistics, Ltd., Kintetsu World Express, Inc., MOL Logistics (Japan) Co., Ltd., Nippon Express Co., Ltd., Nishi-Nippon Railroad Co., Ltd., Nissin Corporation, United Aircargo Consolidators, Inc., Vantec World Transport Co., Ltd., Yamato Global Logistics Japan Co., Ltd. and Yusen Air & Sea Service Co., Ltd.

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The Japanese Defendants join and submit this memorandum in support of Late-Served Defendants' Motion to Dismiss the Amended Complaint for Failure to Meet the Requirements of the FTAIA and in support of the previously-filed Defendants' Joint Motion to Dismiss the Amended Complaint for Failure to Meet the Requirements of the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a (including Defendants' Joint Memorandum of Law in Support thereof filed on November 16, 2009, ECF No. 235, 235-1, and Defendants' Joint Memorandum of Law in Reply to Plaintiffs' Opposition to Defendants' Joint Motion filed on March 5, 2010, ECF No. 373) (collectively "Defendants' Joint FTAIA Motion") and incorporate herein the arguments raised in that motion.

I. The FTAIA Bars Plaintiffs' Claims

The arguments and analysis included in Defendants' Joint FTAIA Motion are equally applicable to Plaintiffs' allegations against the Japanese Defendants. The alleged conduct of these entities, like the alleged conduct of the other Defendants, involves activity that occurred outside of the United States and allegedly affected only freight forwarding services outside of the United States (such as the arrangement, organization and planning of freight shipments out of Japan). Specifically, the Japanese Defendants are alleged to have agreed and imposed charges, surcharges or fees to be applied to rates charged for certain local freight forwarding services.[2] Each of the alleged charges relates to local activity outside of the United States and does not involve U.S. commerce for purposes of the FTAIA.

For this reason and the reasons explained in Defendants' Joint FTAIA Motion, Plaintiffs' allegations are, as a matter of law, insufficient to demonstrate that the Japanese Defendants'

[2] The specific claims are an alleged Japanese fuel surcharge agreement (Claim 2), an alleged Japanese AMS charge agreement (Claim 4), alleged 2006 Japanese security charge and explosives examination charge agreements (Claim 10), and a purported conspiracy involving each of the allegations in Claims 2, 4, and 10 (Claim 12).

alleged conduct outside the U.S. had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce that gave rise to their antitrust claims. *See* 15 U.S.C. § 6a (1)(A). Nor do Plaintiffs sufficiently allege that such conduct qualified as import commerce that would fall within the scope of the FTAIA. *See id.*

II. Claims That Do Not Involve Import Trade or Commerce or Direct, Substantial and Foreseeable Effects on U.S. Commerce Should Be Dismissed

The Japanese Defendants focus their briefing on Claim 2 as an example demonstrating that the conduct alleged against the Japanese Defendants does not involve import commerce or have direct, substantial and foreseeable effects on U.S. commerce under the FTAIA, and that this Court's analysis in *Air Cargo* supports dismissal of Plaintiffs' claims. The relevant conduct alleged in Claim 2 involves an agreement among foreign companies to impose a fuel surcharge for a service provided to customers in Japan—"*organiz[ing]* the transportation of freight" for transport from Japan by air cargo carriers (Am. Compl. ¶ 108) (emphasis added).[3] Such foreign conduct is not import trade. Also, because there is no direct, substantial, and foreseeable effect on U.S. commerce, under the FTAIA, the Sherman Act is not applicable.

Plaintiffs cannot bypass the FTAIA by tacking on a vague, conclusory allegation that "[s]uch unlawful agreement had a direct, substantial and foreseeable effect on U.S. trade and commerce, including U.S. import trade and commerce" (Am. Compl. ¶ 203(b)). As pointed out in Defendants' Joint FTAIA Motion—and incorporated by reference here—such a "formulaic recitation" is insufficient to meet the requirements of the FTAIA (ECF No. 235 at 9) (citation omitted). Therefore, Claim 2, just as Plaintiffs' other claims, fails to allege any import

[3] Similarly, the other alleged conduct directly affecting the Japanese Defendants includes an AMS surcharge, a security surcharge, and an explosives examination surcharge *all* imposed on *Japanese* freight forwarding services performed in Japan.

commerce or any direct, substantial and foreseeable effect on U.S. commerce and should be dismissed.

A. The relevant conduct alleged in Claim 2 involves an agreement in connection with arrangement of flights by Japanese Defendants between shippers and carriers in Japan to locations around the world.

Claim 2, styled as the "2002 Fuel Surcharges Agreement," should be dismissed because, just as with respect to Plaintiffs' other charges, the conduct alleged in that Claim does not involve "import commerce."[4] As this Court already has held:

> To determine whether the plaintiffs' Sherman Act claims are permitted under the FTAIA, the court focuses on two issues. First, what is the *relevant* conduct here? Second, does that conduct *involve* import trade or import commerce?

In re Air Cargo Shipping Servs. Antitrust Litig., "Report & Recommendation," MD 06-1775 (JG) (VVP), slip op. at 24–25 (E.D.N.Y. Sept. 26, 2008) (internal quotation marks and citations omitted) (emphasis in original).

Plaintiffs allege that the relevant conduct in Claim 2 is the imposition of a fuel surcharge on the service of organizing transportation for shippers that transport their goods via air cargo carriers from Japan to destinations worldwide. The Amended Complaint defines "Freight Forwarding Services" as "services relating to the *organization* of transportation of items" (Am. Compl. ¶ 16) (emphasis added). Plaintiffs also state that "[u]sing a Freight Forwarder is often the fastest and most efficient means for a shipper or receiver *to organize* the transportation of freight" (Am. Compl. ¶ 108) (emphasis added). Freight forwarders are, according to Plaintiffs, "third party logistics providers" (Am. Compl. ¶ 16). In fact, Plaintiffs claim that in response to a fuel charge assessed by airlines, a number of Defendants in Japan conspired to impose a "corresponding fuel surcharge" on their customers (Am. Compl. ¶¶ 197-98). Thus, based on

[4] As discussed above, the conclusory recitation that such alleged conduct "had a direct, substantial and foreseeable effect" on U.S. trade and commerce is insufficient standing alone.

Plaintiffs' own allegations, the relevant conduct is adding a fuel charge to a service provided in Japan—making arrangements in Japan for the shippers to use air cargo services out of Japan.

Indeed, the U.S. subsidiaries of Japanese Defendants separately moved to dismiss the Amended Complaint because there are no allegations whatsoever of anticompetitive conduct by them. *See* U.S. Subsidiary Defendants' Memorandum of Law in Support of Motion to Dismiss, ECF No. 233-1 at 1 ("[T]he FAC is entirely silent with respect to the U.S. Subsidiaries, asserting no claims or substantive allegations against them whatsoever."); U.S. Subsidiary Defendants' Reply Brief, ECF No. 366 at 1 ("The FAC contains not a single allegation that the U.S. Subsidiaries participated in any of the alleged conspiracies described therein."). This only underscores that the relevant conduct in Claim 2 involves a local service in Japan.

B. <u>The alleged conduct does not involve import trade or import commerce.</u>

Where no direct, substantial and foreseeable effect has been adequately alleged, the Sherman Act does not apply to trade or commerce with foreign nations unless the conduct involves import trade or import commerce. *See* 15 U.S.C. § 6a. The conduct alleged in Claim 2 is a particular service—the *arrangement* of transportation in Japan to destinations outside of Japan—and does not involve either import trade or import commerce. Claim 2 does not include any allegation that Defendants themselves transported goods or services into the U.S. In short, the allegations relate to conduct in Japan by Japanese companies, regarding the service these companies provide to customers in Japan.[5]

Plaintiffs attempt to link the relevant conduct to import commerce in their conclusory allegation that fuel surcharges are imposed "on [Defendants'] customers, including on flights between Japan and the U.S. . . ." (Am. Compl. ¶ 197). Again, this allegation relates to a claim

[5] Elsewhere in the Amended Complaint, Plaintiffs may allege acts occurring within the United States, but none of those allegations are part of the conduct alleged in Claim 2.

that Defendants added a surcharge to the service of arranging for air cargo transportation by the carriers—not to the service of actually bringing the goods into the U.S. (which is the service this Court analyzed in the *Air Cargo* decisions, as discussed below).

Further, in order to "involve import commerce," the relevant conduct must target the U.S. import market; it is not sufficient for conduct involving worldwide commerce to have some attenuated effect on the U.S. market. *See Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 395-96 (2d Cir. 2002), *overruled on other grounds, F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (finding FTAIA bars plaintiffs' claims where relevant conduct was not alleged to be directed at U.S. import market); *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 303 (3d Cir. 2002) (holding that relevant conduct must be directed at U.S. import market in order for defendants' conduct to involve import trade or import commerce); *Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp.*, 596 F.Supp.2d 842, 876-77 (D.N.J. 2008) (holding FTAIA bars plaintiffs' claims which failed to allege that defendants' worldwide business activity targeted United States). Here, by claiming the Japanese Defendants "shipped from Japan to locations around the world," Plaintiffs concede that the Japanese Defendants' services that are the subject of Plaintiffs' allegations were not specifically targeted at U.S. commerce and therefore do not involve import commerce for purposes of the FTAIA (Am. Compl. ¶ 203(a)).

C. Dismissal of Claim 2 is consistent with *Air Cargo*.

This Court's ruling in *Air Cargo* supports the conclusion that Claim 2, as well as the Plaintiffs' other claims, do not involve import commerce, and therefore that the FTAIA precludes the assertion of subject matter jurisdiction.[6] In *Air Cargo*, the Court found that the

[6] As explained above and in Defendants' Joint FTAIA Motion (ECF No. 235), Plaintiffs have failed to allege a direct, substantial and foreseeable effect on U.S. commerce.

actual transportation of goods by airfreight involved import commerce because the conspiracy targeted a "primary vehicle of modern import commerce." *In re Air Cargo Shipping Servs. Antitrust Litig.*, "Report & Recommendation," MD 06-1775 (JG) (VVP), slip op. at 27. This Court observed that "[t]ransportation to the United States is of course essential to the commerce in those imported goods; the commerce obviously ***could not occur unless*** the goods are transported from their country of origin to the United States." *Id.* (emphasis added). Here, Plaintiffs do not—indeed, cannot—make a similar allegation regarding the Japanese Defendants' conduct in Claim 2.

The Japanese Defendants' alleged conduct is distinguishable from the actual transportation at issue in *Air Cargo*, which this Court found had "not [been] rendered in one location" but instead "performed along entire transportation routes, touching both the country of origin and the country of destination." *Id.* at 26. In contrast, in Claim 2, Plaintiffs allege a locally-formulated, locally-monitored conspiracy among Japanese Defendants in arranging for transportation out of Japan—not, as in *Air Cargo*, actually transporting the cargo into the United States. In *Air Cargo*, this Court found the "inseparable connection" between airfreight and import commerce to be "sufficient to draw the conclusion that the defendants' price fixing conduct targeting such a primary channel of import trade and commerce involves import trade or import commerce within the meaning of the FTAIA." *Id.* at 27 (internal quotation marks omitted). That "inseparable connection" is absent from the Japanese Defendants' alleged conduct in the present case. Plaintiffs have not alleged and are unable to plausibly allege that the service of arranging for transportation out of Japan is inseparably connected to import commerce.

Along a legal continuum indicating involvement in import commerce, this Court placed *Kruman*, *CSR Limited*, and *Turicentro* at one end and *Carpet Group* at the opposite end. The Court found that the conspiracies in the former group "had little to do with import commerce: neither overseas auctions commissions, nor travel agent commissions nor insurance coverage secured from foreign insurers concern import commerce in any but the most attenuated manner." *In re Air Cargo Shipping Servs. Antitrust Litig.*, "Report & Recommendation," MD 06-1775 (JG) (VVP), slip op. at 28. On the other hand, in *Carpet Group*, the conspiracy had targeted a specific import market. Even though the conspiracy in *Air Cargo* had not targeted a specific import market, this Court found that the relevant conduct had "clearly involve[d] import commerce in a way that conduct involving commissions charged abroad does not." *Id.* at 29. The *Air Cargo* defendants' conduct directly targeted "a channel of import trade and import commerce" and was determined to be "closer to that examined in *Carpet Group* than that presented in the three other cases." *Id.*

In the present case, by comparison, the Japanese Defendants' alleged conduct occurred in Japan and is further removed from any import commerce than the conduct alleged in either *Carpet Group* or *Air Cargo*. Like the travel agency services in *Turicentro*, and as Plaintiffs allege, the Japanese Defendants arrange for flight services for shippers to transport their good via air cargo carriers.[7] Like travel agency services, the Japanese Defendants do not directly bring goods or services into the United States. Also like travel agency services, the Japanese Defendants arrange for the transport of their customers' goods, regardless of the destination of

[7] The fact that the travel agents in *Turicentro* were the plaintiffs does not alter the analysis. The travel agents sought to characterize the relevant conduct as involving import trade or import commerce by pointing to the effect their own travel agency services have on the U.S. market—and how defendants' conduct would cause anticompetitive harm to that trade. Despite this attempt, the court held that by targeting the commission rates paid to foreign travel agents based outside the United States, the defendants were not involved in import trade or import commerce. *Turicentro*, 303 F.3d at 303-04.

travel. The alleged conduct in *Turicentro* was "fixing rates of travel agent commissions." *Id.* at 28. The alleged conduct in Claim 2 is fixing the surcharge added on to the service of arranging flights for customers. This Court held the alleged conspiracy in *Turicentro* to have "little to do with import commerce" and "only tangentially, if at all, related to import commerce." *Id.* The same analysis applies here and supports the dismissal of Claim 2.

D. Plaintiffs are not entitled to relief under Claim 2 based on conduct that is not part of Claim 2.

The FTAIA permits Sherman Act jurisdiction over foreign conduct *only* if that conduct has a direct, substantial, and foreseeable effect on United States commerce, and such effect gives rise to a Sherman Act claim. *See, e.g., F. Hoffman-La Roche, Ltd. v. Empagran, S.A.*, 542 U.S. 155, 162 (2004). To the extent Plaintiffs seek recovery under Claim 2, they are required to allege unlawful conduct in *that* claim and allege jurisdiction over that *particular* conduct. Unable to allege that the Japanese Defendants' conduct in Claim 2, or any other claim, involves import trade or import commerce, Plaintiffs attempt to improperly blur the scope of the relevant conduct across all claims. For example, Plaintiffs suggest that freight forwarding could hypothetically include a broad set of services. *See* Am. Compl. ¶ 16 ("[Freight Forwarding Services] ***can*** include related activities such as customs clearance, warehousing and ground services") (emphasis added); Am. Compl. ¶ 106 ("Acting for the shipper, a Freight Forwarder ***may*** assist in all aspects of cargo transport, from pick up to drop off, and thus provides a wide variety of services") (emphasis added). But, Plaintiffs concede that "the majority of Freight Forwarders are ***brokers*** for Freight Forwarding Services" (Am. Compl. ¶ 108). In short, Claim 2 contains no allegation that involves these other services that could be offered by a freight forwarder.

In Claim 2, Plaintiffs have not alleged that the conspiracy was broader than the service of brokering transportation abroad. Therefore, Plaintiffs cannot rely on such other services provided by some of the Defendants as a basis to meet the requirements of the FTAIA for Claim 2. Thus, Claim 2 should be dismissed under the FTAIA because it alleges a conspiracy in connection with brokering or arranging transportation for goods abroad—a service akin to those provided by foreign travel agents and a service that this Court has previously reasoned does not involve import commerce or import trade.

III. Conclusion

The Japanese Defendants incorporate herein the arguments raised in Defendants' Joint FTAIA Motion. Plaintiffs' allegations are, as a matter of law, insufficient to demonstrate that the Japanese Defendants' alleged conduct outside the U.S. had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce that gave rise to their antitrust claims. Nor do Plaintiffs sufficiently allege that such conduct qualified as import commerce that would fall within the scope of the FTAIA.

For all of the foregoing reasons, the Japanese Defendants respectfully request that the Court dismiss the Amended Complaint for failure to meet the requirements of the FTAIA.

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